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549041—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 272

MOSES L. PARSHELSKY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 22–33) is reported in 46 B. T. A. 456. The prevailing (R. 83–86) and dissenting (R. 86–89) opinions in the Circuit Court of Appeals are reported in 135 F. 2d 596.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 21, 1943 (R. 89). The petition for a writ of certiorari was filed August 19, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Prior to 1938, the taxable year, the taxpayer and his brother purchased reciprocal annuity contracts. Each applicant named the other as the primary annuitant and the applicant or his estate was entitled to receive the annuity payments which should become payable after the death of the annuitant. Taxpayer's brother died in 1935 before receiving payments under any of the contracts. The taxpayer received payments under all of these contracts in 1938 and the question is to what extent these payments are taxable to him under Section 22 (b) (2) of the Revenue Act of 1938.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 9–12.

STATEMENT

The Board of Tax Appeals found the following facts (R. 23–26):

During the months of December 1934 and January 1935, pursuant to agreement between the taxpayer and his brother, Isaac Parshelsky, each applied for and received five single premium an-

nuity contracts, in which the other was named as an annuitant and the applicant or his estate was entitled to receive the annuity payments which should become due and payable after the death of the annuitant, if the applicant survived the annuitant. The consideration paid for the contracts was $400,000, one-half of which was paid by each of the brothers. (R. 23.)

Before and at the time of the purchase of the annuity contracts, the brothers were indebted to the United States for income taxes and to others and knew that a jeopardy assessment of the taxes against them was being considered, but did not know the amount of the taxes claimed by the Commissioner to be due and owing. Isaac died on March 18, 1935, before he had received any payments under any of the refund annuity contracts and before any such payments became due or payable. (R. 24.)

The taxpayer received the following payments on annuity contracts during the years 1935, 1936, 1937, and 1938 (R. 24): From the contracts under which he was named as annuitant, taxpayer received total payments of $11,318 in 1935 and $14,980 in each of the years 1936, 1937, and 1938. From the other contracts, he received $14,390.50 in each of the years.

The annuity contracts were all single-premium contracts and no further consideration, apart from the $200,000 paid by each of the brothers, was at any time paid by either the taxpayer or his brother (R. 25).

By virtue of the agreement between the two brothers and with the insurance companies issuing the contracts or policies, the brother (and his estate) living after the death of the other was entitled to receive the annuity (called refund annuity) theretofore received by the annuitant dying (R. 25).

The following table shows the parts of the entire consideration which were charged and paid under each of the contracts on account of its provision for the payment of a life annuity and on account of its provision for the payment of refund annuities after the death of the annuitant and, as to the refund annuities, that part of the consideration charged and paid for the undertaking to make such refund annuity payments to the beneficiary or his estate in the event the beneficiary survived the annuitant, and that part of the consideration charged and paid for the undertaking to make such refund annuity payments to the estate of the annuitant in the event the beneficiary did not survive the annuitant (R. 26):

Exhibit No.	Contract No.	Total consideration	Consideration for life annuity	Consideration for refund annuities		
				Total	For payments to beneficiary if he survive or his estate	For payments to annuitant's estate if beneficiary does not survive
		(1)	(2)	(3)	(4)	(5)
Applied for by Isaac Parshelsky:						
1	34258	$75,000	$64,311.62	$10,688.38	$9,358.93	$1,329.45
2	34600	50,000	42,874.41	7,125.59	6,239.29	886.30
3	AN12507	25,000	21,425.61	3,574.39	3,130.42	443.97
4	023427	25,000	20,765.00	4,235.00	3,722.32	512.68
5	023428	25,000	20,765.00	4,235.00	3,722.32	512.68
Total		200,000	170,141.64	29,858.36	26,173.28	3,685.08
Applied for by the taxpayer:						
6	34259	75,000	65,226.24	9,773.76	8,308.67	1,465.09
7	34601	50,000	43,484.16	6,515.84	5,539.12	976.72
8	AN12506	25,000	21,715.84	3,284.16	2,794.18	489.98
9	023425	25,000	21,084.63	3,915.37	3,352.90	562.47
10	023426	25,000	21,084.63	3,915.37	3,352.90	562.47
Total		200,000	172,595.50	27,404.50	23,347.77	4,056.73

The Board of Tax Appeals held (R. 31-33) that of the $200,000 paid by taxpayer, $173,826.62 is the basis for computing the 3 percent taxed against annuities, and the remainder, $26,173.28, must be considered the consideration paid for a transfer, by taxpayer's brother, of the right to receive payment upon survival of the brother; accordingly, taxpayer is accountable under Section 22 (b) (2) of the Revenue Act of 1938 (Appendix, *infra*) for that part of $14,980 received in 1938 from the contracts under which he was named as annuitant which amounts to 3 percent of $173,826.62 and all of the $14,390.50 received from

the other contracts. The court below reached a slightly different result: it held the taxpayer accountable for three percent of $176,652.23 instead of $173,826.62, as well as for all of the $14,390.50 (R. 86).

ARGUMENT

Section 22 (b) (2) of the Revenue Act of 1938 (Appendix, *infra*) provides that amounts received as an annuity under an annuity contract shall be included in gross income; except that there shall be excluded the excess of the amount received in the taxable year over an amount equal to three percent of the aggregate consideration paid for such annuity until the amount excluded equals such consideration. In the case of a transfer for a valuable consideration, of an annuity contract, or any interest therein, only the actual value of such consideration and the amount subsequently paid by the transferee shall be exempt.

Article 22 (b) (2)–2 of Treasury Regulations 101 (Appendix, *infra*) provides that amounts received as an annuity under an annuity contract include amounts received in periodical installments, whether annually, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. Such portion of each installment payment of an annuity

shall be included in gross income as is not in excess of three percent of the aggregate consideration paid for such annuity. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate consideration paid, the entire amount received thereafter must be included in gross income.

In the instant case the court below held that the taxpayer is accountable for $5,299.57, being three percent of $176,652.23, which the court concluded was the cost to him of the annuities which he received under the contracts taken out by his brother Isaac. The court also held that he was accountable for $14,390.50, being the total payments received under the contracts which he had taken out personally, the reason for the inclusion of the full amount received being that in prior years he had received more than $23,347.77, which the court concluded was the consideration paid by the taxpayer for such benefits. We submit that the decision is correct and in accordance with the law and the regulations.

In support of his application for certiorari the taxpayer does not assert a conflict with the decision of any Circuit Court of Appeals but does assert (Pet. 12–13) a conflict with *Helvering* v. *Le Gierse,* 312 U. S. 531. It is plain that no such conflict exists. In that case, this Court held that a life insurance policy and an annuity policy issued at the same time should be considered together to determine whether there was any real insurance risk and

that so considered, there was no such risk and the "insurance" proceeds should be included in the gross estate of the decedent as a transfer intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended, and not within the scope of Section 302 (g) of that Act, relating to amounts receivable as insurance. But surely it does not follow from the foregoing that the benefits under any particular contract cannot be severed for purposes of determining their respective values in case of a transfer. Here the court was required, in order to apply the statute, to apportion the consideration paid; it reached its conclusion on the basis of the findings of the Board of Tax Appeals (R. 25–26), which were adequately supported by the testimony of a qualified actuary (R. 49–57).

CONCLUSION

The decision is correct; there is no conflict; the petition should be denied.

Respectfully submitted.

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SEPTEMBER 1943.